Filed 10/8/04 In re S.R. CA5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re S. R. et al., Persons Coming Under the Juvenile Court Law.	
STANISLAUS COUNTY COMMUNITY SERVICES AGENCY, Plaintiff and Respondent, v. GABRIEL O., Defendant and Appellant.	F045289 (Super. Ct. Nos. 505005, 505010, 505569, 505570) **O P I N I O N**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy B. Williamsen, Commissioner.

Janice A. Jenkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Michael H. Krausnick, County Counsel, and Carrie Stephens, Deputy County Counsel, for Plaintiff and Respondent.

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Gabriel O. appeals from orders terminating his parental rights (Welf. & Inst. Code, § 366.26) to his six children.[1] He accuses respondent Stanislaus County Community

[*] Before Vartabedian, Acting P.J., Harris, J., and Cornell, J.

Services Agency (the Agency) of neither satisfying the notice requirements of the Indian Child Welfare Act (25 U.S.C. § 1901 et seq.; ICWA) nor supplying the court with an adoption assessment prepared in part by the county adoptions agency. On review, we will affirm.

PROCEDURAL AND FACTUAL HISTORY

On New Year's Day 2002, sheriff's deputies responded to a domestic violence incident at the home of appellant and the mother of his children. The couple then had four children, three girls and one boy, who ranged in ages six months to six years. Appellant, who fled upon the deputies' arrival, had a history of battering the mother and his children. The officers arrested the mother for child endangerment and, having found the home to be unfit, filthy and unsafe for the children, referred them to the agency. These circumstances led the agency to initiate dependency proceedings (§ 300, subd. (b) & (g)).

The Stanislaus County Superior Court adjudged the four children dependents of the court in March 2002, formally removed them from parental custody, and ordered reunification services for the mother. The court denied reunification services for appellant, whose whereabouts were unknown for virtually the entire proceedings. Later in 2002, the mother gave birth to twin girls, whom the court also adjudged dependent children.

Despite lengthy reunification efforts in 2002 and 2003, the mother did not regain custody of any of her children. Although she made progress towards correcting the problems that led to the children's dependencies, she was overwhelmed at the prospect of caring for the children and eventually stopped participating in services. Consequently, in October 2003, the court terminated reunification efforts and set a section 366.26 hearing

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1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

to select and implement a permanent plan for each of the children. The court, having found the agency exercised due diligence in attempting to locate appellant, also authorized notice to him by publication.

In anticipation of the section 366.26 hearing, the agency prepared a report and an addendum recommending the court find each of the children adoptable and terminate parental rights. Foster parents who had cared for three of the girls throughout their dependencies wished to adopt them as well as the boy with whom they were well acquainted. The boy's foster mother was a relative of the foster parents caring for the three girls. The agency located another couple who were committed to adopting the remaining two girls.

Appellant made his first appearance at the section 366.26 hearing, which was eventually conducted in March 2004. After hearing evidence and argument in the case, the court found the six children adoptable and terminated parental rights.

DISCUSSION

I. *ICWA Notice*

At an early stage of the underlying proceedings, a social worker questioned the mother as to whether the children had any American Indian ancestry. The mother reported yes and identified Apache, Hopi, and Yaqui tribal ancestry on her side of the family and Yaqui tribal ancestry on appellant's side. The agency thereafter attempted to give the Bureau of Indian Affairs (BIA) and 11 Indian tribes notice of the dependency proceedings so that a determination could be made regarding whether the children were entitled to the benefits of ICWA.

It is undisputed that the agency's first attempt was defective. In particular, the agency failed to make an adequate documentary record of its compliance with ICWA notice requirements, as this court required in *In re H.A.* (2002) 103 Cal.App.4th 1206, 1215.

Nevertheless, the agency again served notice of the proceedings on the BIA and the same tribes in October 2003 once the court set the section 366.26 hearing; the agency this time documented its notice efforts with the court. Appellant contends the October 2003 notice was inadequate in the following respects: (1) the agency did not properly complete a notice form with all the family identifying information it either had or could have obtained; and (2) the agency mailed its notice for one tribe, the Jicarilla Apache Tribe in Dulce, New Mexico, to the wrong post office box. As discussed below, we disagree with each of appellant's contentions.

With regard to the notice form completed by the agency, appellant criticizes the agency for not including his and the mother's birthplaces and tribal affiliations. He also challenges the agency for not including the mother's maiden name, which he postulates is the same as the last names of the maternal grandmother and the couple's oldest child. In *In re Gerardo A.* (2004) 119 Cal.App.4th 988, 990, this court held a department's compliance with express ICWA notice requirements will not suffice if the appellate record also reveals the department possessed identifying Indian heritage information that it did not share with one or more tribes of which the dependent child could be a member.

We note that appellant's complaints are based not on any affirmative showing in the record, as was the case in *In re Gerardo A., supra,* but rather on speculation and assumptions that do not amount to reasonable inferences to be drawn from the record (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379). For example, the mother claimed both for herself and appellant Native American heritage; she did not claim any tribal affiliation. There is also no evidence that the mother knew the father's birthplace. While one might guess that the mother could have supplied her own birthplace, the point remains speculative. The same is true for appellant's assumption that the mother's last name, which was different from his, was nonetheless not her maiden name.

As to appellant's other complaint regarding the post office box to which one of the notices was mailed, we also find no ICWA error. Proper notice to some but not all

possible tribes in which a dependent may be eligible for membership does not violate ICWA when, as in this case, BIA also receives notice. (*In re Edward H., Jr.* (2002) 100 Cal.App.4th 1, 3.)

On a final note, we observe that appellant voices these complaints for the first time on appeal. Although the agency submitted its ICWA notice documentation with its written report to the court in advance of the section 366.26 hearing, appellant and his trial counsel who received a copy of the report were silent with regard to this evidence. If either of the parents and/or their trial counsel seriously believed the agency did not do enough and could have done more to enable BIA and the tribes to investigate whether the children were Indian children under ICWA, we question the parties' silence in juvenile court given our decision in *In re H.A., supra,* and the opportunity to resolve any factual issue then and there.

II. ***Adoption Assessment***

Appellant also challenges the adequacy of the agency's assessment of the children's adoptability. Specifically, he charges that the licensed county adoption agency did not participate in the adoption assessment in violation of the statutes detailing adoption assessment requirements (§§ 361.5, subd. (g); 366.21, subd. (i); & 366.22, subd. (b)).[2] Notably, he does not contend his children were not adoptable, but rather only that Stanislaus County's licensed adoption agency, with its expertise in the matter, did not participate in the assessment of the children's adoptability.

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[2] Each of these sections contain the identical language and include the requirement that: "[w]henever a court orders that a hearing shall be held pursuant to Section 366.26, it shall direct the agency supervising the child and *the licensed county adoption agency*, or the State Department of Social Services when it is acting as an adoption agency in counties that are not served by a county adoption agency, to prepare an [adoption] assessment . . . ." (§§ 361.5, subd. (g) (emphasize added); 366.21, subd. (i); & 366.22, subd. (b).)

Having not objected to the adequacy of the assessment in the juvenile court, appellant has failed to preserve the issue for appellate review. (*In re Urayna L.* (1999) 75 Cal.App.4th 883, 886; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-13.) In his reply brief, appellant contends no objection was required to preserve his right to challenge the sufficiency of the evidence to support an adoptability finding. We agree a parent need not lodge an objection to argue on appeal insufficient evidence of adoptability. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623.) However, that was not appellant's argument in his opening brief or, for that matter, in his reply brief. Rather, his claim was and is that the assessment was inadequate because there was no showing that Stanislaus County's licensed adoption agency participated in the assessment of the children's adoptability.

In dealing with a parent's failure to object to the admissibility of improper evidence or some other alleged procedural error, courts have noted any rule other than waiver would permit a party to trifle with the administration of justice. The party could then deliberately stand by without making an objection of which he is aware and thereby permit the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not. (*In re Lorenzo C., supra,* 54 Cal.App.4th at p. 1339.) Such is the case here. In this regard, we also note respondent's strenuous objection that had appellant raised his concern in the juvenile court "he would have learned what everyone else in the courtroom already knew – that the Community Services Agency is itself a licensed adoption agency" and one of the co-authors of the report was an adoptions specialist.

DISPOSITION

The orders terminating parental rights are affirmed.